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No. 77-1829

In the Supreme Court of the United States

OCTOBER TERM, 1978

GRIFFIN B. BELL, ET AL., PETITIONERS

v.

LOUIS WOLFISH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-37a) is reported at 573 F.2d 118. The opinions of the district court (Pet. Apps. F and G, 74a-225a) are reported at 439 F. Supp. 114 and 428 F. Supp. 333.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, 38a-39a) was entered on January 24, 1978. On

April 14, 1978, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 24, 1978. On May 15, 1978, Mr. Justice Marshall further extended the time for filing a petition for a writ of certiorari to and including June 23, 1978. The petition was filed on that date and was granted on October 2, 1978 (A. 97). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that the validity of double-celling of pretrial detainees be judged by a standard of "compelling necessity" and without consideration of the administrative and financial circumstances that have led to adoption of the challenged practice.

2. Whether the governmental interest in maintaining jail security and order justifies rules that (a) prohibit receipt at the jail of packages containing items of food or personal property; (b) prohibit receipt at the jail of hardbacked books that are not mailed directly from publishers or bookstores; (c) require inmates to expose body cavities for visual inspection as part of the search conducted after contact visits with persons from outside the detention center; and (d) authorize the exclusion of pretrial detainees from their rooms during routine inspections.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. 3041 provides in part:

> For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of the common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense

of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * *

18 U.S.C. 4042 provides in part:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction and discipline of all persons charged with or convicted of offenses against the United States * * *.

STATEMENT

1. The federal Metropolitan Correctional Center (MCC) is located in New York City adjacent to the Foley Square courthouse. The primary objective of the MCC is to house persons who are being detained in custody prior to trial for federal criminal offenses in the Southern and Eastern Districts of New York and the District of New Jersey. In addition, the MCC houses some convicted inmates who are awaiting sentencing or transportation to federal

prison or who are serving their sentences in a service capacity at the MCC (Pet. App. 4a-5a, 200a-202a).[1]

The MCC was constructed in 1975 to replace the aging federal West Street facility, which had been in use in New York City since 1928. At the time the MCC was designed, it was intended to incorporate the most advanced and innovative features of modern correctional design. As the court of appeals stated, "it represented the architectural embodiment of the best and most progressive penological planning" (Pet. App. 4a). The key design element of the facility is the modular or unit concept, in which a number of self-contained residential units replace the traditional cellblock jail construction. The typical unit consists of approximately 48 private rooms (or six larger dormitory rooms) adjoining or opening onto common multi-purpose rooms to which the detainees have free daytime access.[2] The common areas include facilities for food preparation and dining, recreation, and education. Each of the units also has an adjacent area for receiving visitors. By eliminating any need for frequent, scheduled move-

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[1] Many of the convicted inmates at the MCC are prisoners who have been lodged at the facility under writs of habeas corpus *ad prosequendum* or *ad testificandum* issued to secure their presence at forthcoming trials. To the extent these include state prisoners against whom federal detainers have been lodged, they cannot be returned to state custody because of the Interstate Agreement on Detainers. See *United States* v. *Mauro*, No. 76-1596 (May 23, 1978).

[2] The period of free access varies from 15 to 17 hours per day (Pet. App. 4a).

ments of detainees into different functional areas of the facility, it was expected that the modular design would "humanize staff-inmate relations and provide a more 'homelike' atmosphere, affording inmates greater privacy and freedom than jails of earlier construction" (Pet. App. 4a-5a).[3]

2. Initial plans for the MCC provided for a capacity of approximately 400 inmates, or an increase of one-third over the West Street facility (A. 89-91).[4] These plans were later revised and expanded so that at the time the MCC opened the planned capacity was 449 inmates, or approximately 50 percent greater than at the old jail (Pet. App. 6a, 115a).

During the period that the MCC was under planning and construction, the number of persons committed to pretrial custody began to rise at an unprecedented rate (*ibid.*). When the MCC was opened, the Bureau of Prisons employed several measures in an effort to manage the unexpected flow of persons committed to that facility. The Bureau located persons awaiting deportation proceedings at other federal facilities and eliminated the planned community treatment center, or "half-way house," at the MCC

[3] As the court of appeals noted, the residential atmosphere of the facility is enhanced by carpeting and by clear exterior windows without bars (Pet. App. 5a).

[4] The population at the West Street facility had been 285-300 inmates (J.A. 2122, 2375). "J.A." refers to the Joint Appendix in the court of appeals.

(J.A. 1657).[5] The Bureau also arranged to expedite the transfer of inmates to prisons upon sentencing and contracted with private half-way houses for additional bedspace (A. 22, 64-65).

Despite these efforts, however, the inmate population at the MCC began to rise above its planned capacity within a short time after its opening. In November 1975, in order to provide sleeping space for this increased number of inmates, the MCC began to replace single beds with bunk beds in some of the residential rooms used to house pretrial detainees (A. 21).[6] Similarly, the Bureau installed bunk beds in the dormitory rooms in order to double the capacity of those areas (J.A. 1184-1185). During brief periods of unusual influx of persons into the facility, a small number of detainees and inmates were provided with temporary sleeping space in the common areas of the modular units (A. 23). These persons were transferred to residential rooms as soon as space became available (*ibid.*).

3. On November 28, 1975—less than four months after the MCC was opened—Louis Wolfish, then a pretrial detainee at the facility, initiated this action

[5] These changes freed 108 spaces for the housing of pretrial detainees and convicted inmates at the MCC (J.A. 1266-1267, 2501-2502, 2521-2522).

[6] The district court noted that 121 of the 389 residential rooms had been "designated" for double-occupancy as of the time of its decision (Pet. App. 203a). The number of rooms actually housing two inmates, however, did not exceed 73, and, of these, only 35 were rooms in units designated to house pretrial detainees (A. 33-34; J.A. 82).

by filing a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of New York. The petition alleged that overcrowding and other improper conditions at the MCC made confinement at that facility unconstitutional.[7] The district court certified the case as a class action on behalf of all persons confined at the MCC (Pet. App. 7a); the litigation has thus simultaneously implicated the rights of both pretrial detainees and sentenced inmates with regard to their conditions of confinement.

In its two opinions and several orders in this case, the district court declared unlawful and enjoined numerous separate aspects of the MCC administration. In evaluating the lawfulness of conditions of confinement for pretrial detainees under the Due Process Clause, the court stated that, since detainees are "presumed to be innocent and held only to ensure their presence at trial, 'any deprivation or restriction of * * * rights beyond those which are necessary for confinement alone, must be justified by a com-

[7] The petition, as amended, alleged a multitude of constitutional violations at the MCC. These included, *inter alia*, overcrowding; undue length of confinement; improper monitoring of personal mail; improper strip searches after contact visits; inadequate visiting hours; inadequate access to legal materials; inadequate recreational, educational and employment opportunities; inadequate telephone service; restrictions on religious freedoms; restrictions on the purchase and receipt of items of personal property; inadequate and unsanitary food; objectionable uniforms; poor ventilation; insufficient staff; unannounced transfers; and inadequate services for non-English-speaking inmates (Pet. App. 7a-8a and n. 7).

pelling necessity.'" (Pet. App. 89a, quoting *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975)). While the court noted that the rights of convicted inmates must be measured under the different standard of the Eighth Amendment, the court concluded that convicted inmates at the MCC must be treated equally with detainees in terms of essential living conditions because it would be "cruel and unusual" to treat them as an "inferior minority" at the MCC (Pet. App. 213a).

Applying these legal standards, the court granted the inmates' motion for partial summary judgment and enjoined the practice of double-bunking pretrial detainees or convicted inmates in a single residential room at the MCC (Pet. App. 207a-213a). The court relied largely on its visual inspection of the facility and on evidence presented in other cases (*id.* at 205a and n.5, 207a-211a) to reject the government's claim that triable issues of fact exist and that double-bunking provides adequate and reasonable housing at the MCC. The court noted that there is "a good deal of contrary expert opinion about the physical and psychological effects of confining two prisoners in one room or cell" (*id.* at 210a).[8] The court con-

[8] The government presented the affidavit of Dr. Walter Menninger, who stated that "'double-bunking' as practiced at the MCC should not have any significant detrimental effects on the physical or psychological health of the inmates at that institution" (A. 31-32). The respondents presented no evidence on this issue in their motion for summary judgment. The court's reference to conflicting psychiatric testimony was to evidence presented in a different lawsuit involving a different pretrial detention facility (Pet. App. 208a-210a).

cluded, however, that it was not required "to litigate over and over again general propositions about matters of human experience" (*id.* at 211a). The court stated that other litigation had established that double-bunking in a single cell causes "fundamental denials of decency, privacy, personal security, and, simply, civilized humanity" (*id.* at 211a). Although the court acknowledged that there were substantial factual distinctions betwen the conditions at the MCC and at the facilities involved in the prior cases, the court found nothing at the MCC to justify a departure from the earlier decisions (*id.* at 208a, 211a).

Following a month-long trial on remaining issues, the court held unlawful and enjoined the doubling of sleeping quarters in the dormitory areas and the use of common recreational areas to provide temporary sleeping facilities when all other quarters were occupied (Pet. App. 121a-126a). The court concluded that the crowding resulting from these practices abridged the inmates' rights to privacy and decent accommodations, was not justified by any sufficient governmental interest, and was therefore unconstitutional (Pet. App. 116a-121a).

In addition to the holdings based on the Due Process Clause and the Eighth Amendment, the court found that other practices at the MCC violated specific constitutional guarantees applicable to both pretrial detainees and convicted inmates. The court held that the First Amendment rights of all persons confined at the MCC were violated by the Bureau of

Prisons' "publisher only" rule, which at the time prohibited the receipt of all books and magazines mailed from outside the facility except those mailed directly from publishers or book clubs. The court refused to accept the security justifications advanced in support of this practice (Pet. App. 215a-216a). The court also held that the requirements that (i) detainees remain outside their rooms during routine inspections,[9] and (ii) detainees and convicted inmates expose their body cavities for a visual inspection as part of a routine search conducted following contact visits, were not justified by a sufficient governmental interest in security or prison administration. The court held that the former of these two practices violated the retained right of privacy of pretrial detainees, and the latter constituted an unreasonable search in violation of the Fourth Amendment (Pet. App. 147a-157a). Finally, with regard to the issues that are presented for decision by this Court, the district court invalidated the prohibition against receipt of packages containing food and items of personal property by inmates (*id.* at 162a-166a).[10]

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[9] The court did not strike the MCC rule requiring convicted inmates to vacate their rooms during routine inspections (Pet. App. 157a). The court stated that although the justification for the practice was not "compelling," it was sufficient to make the search procedure reasonable and therefore sustainable in the case of convicted inmates (*ibid.*).

[10] The court apparently based this ruling on the fact that the Bureau of Prisons' enabling legislation creates duties to "care" for prisoners and to provide prisoners with "suitable quarters," 18 U.S.C. 4042, 4081, and that these duties are

4. On appeal, the Second Circuit largely affirmed the district court's holdings under the Due Process Clause, while rejecting the district court's reliance on the Eighth Amendment. The court of appeals stated that, under the Eighth Amendment

> [a]n institution's obligation * * * is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety.

Pet. App. 13a, citing *Newman* v. *State of Alabama*, 559 F.2d 283, 291 (5th Cir. 1977). The court of appeals rejected the district court's reasoning that it is cruel and unusual to house prisoners in conditions worse than detainees are housed in the same facility, and remanded for the district court to determine whether the housing for convicted inmates at the

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enforceable to prevent arbitrary and capricious maladministration (Pet. App. 83a-84a). Following the trial, the court relied on this legislation and on the Due Process Clause to hold unlawful and enjoin several other aspects of confinement at the MCC. For example, the court enjoined MCC regulations imposing limitations on visits from family, friends, attorneys, and co-defendants (Pet. App. 129a-140a); limitations on telephone service and commissary privileges (*id.* at 111a-115a, 140a-143a); limitations on the use of the visiting room bathroom (*id.* at 134a-135a); and requirements for the use of an inmate uniform (*id.* at 166a-169a). The court also affirmatively required the MCC to increase the materials available in a law library at the facility (*id.* at 102a-106a) and enjoined the MCC from retaining any detainee or inmate at the facility for a period in excess of 60 days without the inmate's written consent (*id.* at 96a-98a). The district court did not indicate in each case whether it was relying on a statutory or constitutional basis for its various holdings.

MCC was constitutionally "adequate" (Pet. App. 19a-20a).[11]

With regard to the scope of protection afforded pretrial detainees by the Due Process Clause, the court of appeals indicated that the district court had articulated the correct legal standard but had misapplied the standard in some situations. The court reiterated the Second Circuit's view that pretrial detainees may be subjected to "only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration'" (Pet. App. 12a, quoting *Rhem* v. *Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974); *Detainees of the Brooklyn House of Detention* v. *Malcolm*, *supra*, 520 F.2d at 397). The court stated that neither fiscal necessity nor administrative convenience could justify restrictions on the rights of detainees (Pet. App. 12a). At the same time, however, the court stated that "the institution

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[11] The court of appeals also held (Pet. App. 14a-15a) that the district court erred in relying on the Bureau of Prisons' enabling legislation to strike several specific administrative practices as arbitrary and capricious. See note 10, *supra*. The court of appeals noted that 18 U.S.C. 4042 and 4081 confer broad discretion on the Attorney General to safekeep and care for inmates. The court concluded that the administration of federal prisons constitutes "agency action * * * committed to agency discretion by law" and is therefore exempted from judicial review by the Administrative Procedure Act, 5 U.S.C. 701(a)(2) (Pet. App. 14a-15a). On this basis, the court of appeals reversed the district court's holdings that the bathroom in the visiting area must be kept unlocked and that prison authorities must make local and long-distance telephone service available to MCC inmates (Pet. App. 15a-17a).

must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded" and that the courts should not "second-guess the expert administrators on matters on which they are better informed" (*id.* at 12a-13a).

On the issue of double-bunking of detainees, the court concluded that "the administrators of the MCC have made no showing of compelling necessity" to justify the invasion of personal privacy involved (*id.* at 17a), and it prohibited double-celling in rooms intended for one individual (*id.* at 18a-19a). Applying the same analysis, the court held that doubling the number of inmates housed in the dormitory areas was unjustified, but remanded for the district court to determine "whether any number of inmates in excess of rated capacity could be suitably quartered within the dormitories" (*id.* at 21a, 23a).[12]

The court of appeals agreed with the district court that several other aspects of confinement at MCC violated the First Amendment and Fourth Amendment

[12] The court recognized that convicted inmates, rather than detainees, are presently quartered in the dormitory areas. The court referred to a decision involving pretrial detainees, however, in directing the district court to redetermine the constitutional capacity of the dormitory areas (Pet. App. 22a, citing *Ambrose* v. *Malcolm*, 414 F. Supp. 485 (S.D. N.Y. 1976)).

The court also remanded to the district court for it to determine whether, in light of changed conditions resulting from this litigation, the nature of confinement at the MCC is now sufficiently tolerable that the order limiting incarceration of all detainees at the MCC to a period of less than 60 days should be rescinded (Pet. App. 24a-25a).

rights of both convicted inmates and pretrial detainees.[13] Specifically, the court rejected asserted security concerns and upheld the district court's order enjoining the "publisher only" rule that limited the receipt of books and magazines by inmates at the MCC (*id.* at 26a-29a). The court also held that there were no sufficient security or administrative justifications for the MCC policies (1) that prohibit the receipt of packages containing food and personal items by detainees and convicted inmates (*id.* at 32a-33a), (2) that require detainees and convicted inmates to expose their body cavities during routine searches conducted after contact visits (*id.* at 29a-30a), and (3) that prevent detainees from observing searches of their rooms (*id.* at 30a-32a), and it accordingly prohibited continuation of these practices.[14]

[13] Relying on the Sixth Amendment right to counsel and the due process right of prisoners to have access to the courts, the court of appeals affirmed the orders of the district court that require an expansion of the MCC library and maintenance of extended visiting hours for attorneys (Pet. App. 35a-36a).

[14] The court of appeals reversed the ruling of the district court that inmates must be permitted to possess typewriters for their personal use in their rooms. It stated that the district court had improperly rejected "the MCC's judgment that * * * particular problems of security, storage, and theft [would arise] from inmates' ownership of typewriters * * *" (*id.* at 33a). The court of appeals also reversed the district court's determination that inmates should not be required to wear uniforms, holding (*id.* at 34a) that

> the MCC has demonstrated a legitimate security interest in readily identifying inmates that outweighs the inmates' understandable desire to control their own appearance.

SUMMARY OF ARGUMENT

I

In evaluating the constitutionality of conditions of pretrial confinement, the court of appeals concluded that pretrial detainees retain the "rights afforded to unincarcerated individuals" (Pet. App. 11a) and that it is therefore not enough for conditions of confinement merely to "comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause * * *" (*ibid.*). The court held that the Due Process Clause requires that pretrial detainees be subjected to only those "restrictions and privations" that "inhere in their confinement itself or which are justified by compelling necessities of jail administration" (Pet. App. 12a). Applying this analysis to evaluate the permissibility of double-bunking detainees in the residential rooms at the MCC, the court refused to consider governmental fiscal and administrative requirements and concluded that the practice was unconstitutional because the government "made no showing of compelling necessity" to justify the infringement of privacy imposed by double celling (*id.* at 17a).

We submit that the court erred both in its analysis of the general requirements of due process and in its application of that analysis to evaluate the housing conditions afforded pretrial detainees at the MCC. We readily acknowledge that there are significant differences material to the present inquiry between the due process rights of convicted inmates and of pre-

trial detainees. Although the most fundamental liberty interest of the detainee—his right to move freely in society—has been extinguished by the proceedings leading to his commitment, he nevertheless retains significant liberty interests which those proceedings have not impaired. But even accepting the premise that the liberty interests retained by pretrial detainees are essentially equivalent to those of other citizens, this Court has never held that the government must justify every restriction and privation imposed on citizens by a compelling necessity. Under this Court's decisions, unless government action affects an aspect of fundamental liberty, the action need only be shown to be reasonable in light of the government's legitimate interests.

The initial decision to detain a person suspected of committing a crime involves, of course, a fundamental deprivation of liberty. But the government's right to impose this substantial deprivation is a necessary aspect of its responsibility to enforce the criminal law and is not challenged in this case. In evaluating the particular aspects of confinement once detention is ordered, it may be that some institutional restrictions implicate interests that this Court has recognized as fundamental liberties (*i.e.*, First Amendment freedoms) and that a compelling governmental justification would therefore be required to support the government's practice. Other restrictions of confinement, however, impinge only upon the inmates' understandable desire to live comfortably during detention (*i.e.*, possession of items of personal

property). While it may be assumed that the government may not impose arbitrary restrictions or purposeless restraints on such interests, the justification for governmental action affecting these interests need not be compelling.

In accomplishing the important governmental interest in producing the detainee for trial, the government must "make the everyday administrative decisions necessary to run" jails as places of pretrial confinement, adopt rules to "maintain the security of the jail, [and] generally [seek] to sustain the institution of pretrial detention at a feasible cost." *Campbell* v. *McGruder*, 580 F. 2d 521, 528, 531 (D.C. Cir. 1978). Where conditions of confinement not implicating fundamental constitutional guarantees are challenged under the Due Process Clause, it is the reasonableness of the practices that determines whether they should be sustained, and the reasonableness must be assessed in light of the valid governmental objectives they are designed to foster. There may be occasions where the practice impinges on particularly substantial liberty interests whose character is such that the courts should examine with particular care the governmental justifications to assure that they support the challenged restraint. The due process analysis of the court of appeals, however, improperly circumscribes the governmental interests that may justify practices and conditions of pretrial detention by broadly requiring a compelling justification for all restrictions and privations of confinement.

The difficulties inherent in the analysis of the court of appeals are reflected in its conclusion that double-celling in the residential rooms at the MCC violates due process because no "compelling necessity" was shown to support the practice. To be sure, as the court of appeals observed, double-celling affects the individual interest in privacy. The cases in this Court that have defined certain privacy interests as fundamental have never suggested, however, that the interest requires a literal, physical separation of individuals, especially in the context of institutional care or confinement. It may be that, under the analysis adopted by a plurality of this Court in *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977), the interest in privacy and human dignity implicated by housing pretrial detainees in relatively confined, non-private quarters is such that the courts should carefully examine the practice to ensure that it is fairly and substantially related to the government's valid interests. Even under this approach, however, pretrial housing conditions significantly affecting personal privacy should be upheld if, upon a careful examination, they are found to satisfy a minimum standard of decency and humane treatment and to be reasonable in light of the government's substantial administrative and fiscal concerns.

In this case, however, the court of appeals expressly refused to consider the administrative and fiscal interests of the government in upholding the determination, on a motion for summary judgment, that double-celling is unconstitutional. The record

before the district court on the summary judgment motion provided no basis for a conclusion that the practice of double-bunking as implemented at the MCC fails to afford minimally decent and humane conditions or is unreasonable in light of a careful examination of the government's legitimate interests. The court of appeals therefore should have vacated the entry of summary judgment and remanded for further proceedings in which the nature and justification for the practice in the particular context of the MCC would be considered.

II

In its evaluation of institutional restrictions that are designed to promote security and order at the MCC, the court of appeals recognized that maintenance of security and order is a compelling or inherent necessity of jail administration and that an "institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded" (Pet. App. 12a-13a). The court also noted that under this Court's decision in *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), the administrative determination as to the needs of institutional security and order is entitled to substantial deference and the courts should not "second-guess the expert administrators on matters on which they are better informed" (Pet. App. 13a). In reviewing several specific institutional security practices claimed to abridge the constitutional rights of both pretrial and convicted inmates at the

MCC, however, the court of appeals misapplied these principles in rejecting the determination of the correctional officials that the challenged practices serve the facility's substantial interest in security and order.

The government's correctional authorities and other correctional experts testified in the district court that the restriction on the receipt of packages from outside the facility, and on the receipt of books mailed from individuals other than publishers, were necessary to preserve order and to limit the introduction of contraband into the facility. Similarly, these correctional experts established the significant security concerns that support the need to perform a visual inspection of body cavities as part of the search conducted following contact visits and the need to exclude detainees from their rooms while routine room inspections are conducted. In each instance, however, the courts below rejected the evaluation of the correctional experts as to the security interests implicated by the institutional practices.

In doing so, the court failed to identify any substantial evidence suggesting that the government's security concerns were exaggerated or unreasonable. Nor did the court identify any alternative security procedures that would otherwise satisfy the government's reasonable concerns. The court's rejection of the government's security concerns simply represents its disagreement with the judgment of jail officials regarding the security problems that exist and the means required to control them. It is precisely this

type of unguided substitution of judicial for correctional judgment as to the needs of institutional security that this Court has held to be inappropriate.

ARGUMENT

I

DOUBLE BUNKING OF PRETRIAL DETAINEES IN THE RESIDENTIAL ROOMS AT THE METROPOLITAN CORRECTIONAL CENTER HAS NOT BEEN SHOWN TO VIOLATE THE DUE PROCESS CLAUSE

In recent years, federal courts have become increasingly familiar with litigation brought by convicted inmates challenging various conditions of their confinement. *E.g.*, *Hutto* v. *Finney*, No. 76-1660 (June 23, 1978); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Meachum* v. *Fano*, 427 U.S. 215 (1976). In such cases, the courts have accorded "wide-ranging deference" to the determination of prison administrators to implement correctional policy and protect institutional security and order, *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 125, 128, while at the same time affording some protection for constitutional rights whose loss is not "implicit in incarceration." *Id.* at 125; *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).

While certain express constitutional guarantees, such as the First Amendment right of free speech, have been held to remain applicable in the prison context, this Court has recognized that a convicted prisoner's generalized interest in liberty under the Due

Process Clause affords no independent substantive restraint on correctional confinement:

> [G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.

Meachum v. *Fano*, *supra*, 427 U.S. at 224. Accordingly, the court of appeals was correct in stating in this case (Pet. App. 13a) that a convicted prisoner's challenge to conditions of confinement draws no independent force from the Due Process Clause and must instead be based on express constitutional restraints on government action, such as the Eighth Amendment's prohibition against cruel and unusual punishment.

The due process issues in this case, however, principally concern pretrial detainees rather than convicted inmates. Pretrial detainees, who have been ordered confined while awaiting trial and have not been convicted of any crime, retain a generalized interest in liberty under the Due Process Clause that has not been effectively extinguished by the order of confinement. At a minimum, due process of law would require that punishment not be inflicted, nor correction undertaken, prior to an adjudication of guilt. *Ingraham* v. *Wright*, 430 U.S. 651, 671-672 n.40 (1977); *United States* v. *Lovett*, 328 U.S. 303, 317 (1946).

It is common ground among us, the respondents, and the court of appeals that the Eighth Amendment's prohibition against cruel and unusual punishment requires that convicts committed to the custody of the government and confined in custodial institutions must be afforded decent and humane living conditions with regard to such essentials as housing, food, clothing, and medical care. *Duran* v. *Elrod*, 542 F. 2d 998, 999-1000 (7th Cir. 1976). While the Eighth Amendment is not directly applicable to detainees, the minimum levels of decency required in connection with the confinement of convicts are, we agree, applicable to the conditions of confinement of pretrial detainees pursuant to the Due Process Clause. *Ibid.*; *Feeley* v. *Sampson*, 570 F. 2d 364, 370 (1st Cir. 1978). See also *Loe* v. *Armistead*, No. 77-2039 (4th Cir. Aug. 16, 1978), slip op. 9; *Hampton* v. *Holmesburg Prison Officials*, 546 F. 2d 1077, 1079-1080 (3d Cir. 1976).[15] We also do not contest the proposition that conditions of housing, food, and medical care that fail to satisfy these basic standards of decency may

[15] We note in this connection, however, that the content of the minimum required conditions may vary to some extent on the basis of the nature and purpose of the confinement. It is arguable, for instance, that individuals committed to the custody of the government in civil commitment proceedings must be supplied higher levels of medical care than the minima that would be satisfactory in the case of pretrial detainees or convicts. And in distinguishing between the minimum conditions that may be permissible in various contexts, duration of confinement is surely an important factor; conditions that may not be physically or psychologically injurious to persons detained for a relatively brief period might prove unacceptable for longer term confinement.

not be defended by reference to considerations of administrative convenience or limited financial resources.[16]

It is our position, elaborated more fully below (see pages 50-53, *infra*), that the record in this case provides no support for a conclusion that the housing conditions for pretrial detainees at the MCC fall below the minimum levels of decency generally applicable to persons committed to government custody. The more substantial questions presented in this case concern the extent to which pretrial detainees retain constitutional liberty interests that entitle them to better conditions of confinement than are required for convicted inmates and the difference, if any, in the standards by which courts should assess claimed infringements of such liberty interests in the context of confinement of persons not convicted of crime.

The court of appeals, invoking the presumption of innocence, held in this case that pretrial detainees retain "the rights afforded unincarcerated individuals" (Pet. App. 11a), and that therefore "it is not enough that [their] conditions of incarceration * * * merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause * * *" (*ibid.*). Rather, the court stated that the Due Process Clause requires that pretrial detainees be subjected to only those "restrictions and

[16] While administrative and fiscal considerations may not justify such conditions, they would, in our view, remain relevant to the problem of shaping an appropriate remedy to eliminate objectionable conditions.

privations" that "inhere in their confinement itself or which are justified by compelling necessities of jail administration" (Pet. App. 12a, quoting *Rhem* v. *Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974)). It asserted that, in evaluating the conditions of pretrial confinement, "cries of fiscal necessity * * * [and] administrative convenience" cannot justify institutional privations or restrictions (Pet. App. 12a). Applying this analysis to the practice of double bunking detainees in the residential rooms at the MCC, the court stated that "the administrators of the MCC have made no showing of compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling" and thus concluded that the practice was unconstitutional (*id.* at 17a).

We submit that the court erred both in its analysis of the general requirements of due process and in its application of that analysis to evaluate the housing conditions afforded pretrial detainees at the MCC. We argue below that the court's error stems from the application of an incorrect standard for evaluation of the pretrial detainees' challenge to the conditions of pretrial confinement at the MCC and from the court's failure to recognize the legitimate governmental administrative and fiscal concerns that bear on the propriety of the institutional practice. We then argue that the court erred in upholding the grant of summary judgment on this issue, thereby precluding the development of facts material to a

proper analysis of the sufficiency of the housing conditions at the MCC.

A. The Due Process Clause Does Not Require The Government To Demonstrate A "Compelling Necessity" To Justify All "Restrictions and Privations" Resulting From Pretrial Confinement

The premise underlying the due process analysis of the court of appeals is that, since a pretrial detainee must be presumed to be innocent, he is entitled to "the rights afforded unincarcerated individuals" (Pet. App. 11a). Reasoning from this premise, the court concluded that pretrial detainees may not be subjected to any "restrictions and privations" during pretrial confinement except those that inhere in the nature of confinement or that are justified by "compelling" governmental necessities (*id.* at 12a).

Even accepting the premise that the liberty interests retained by pretrial detainees are essentially equivalent to those of other citizens, the court's conclusion does not follow. This Court has never held that the government must justify every "restriction or privation" that it imposes on citizens by a "compelling necessity." The analysis employed by the Court under the Due Process Clause has been more complex. And while there may be room for debate in the present context about the extent to which the courts may properly scrutinize the reasonableness of various conditions of confinement unrelated to recognized fundamental interests, there is no basis for the court of appeals' conclusion that these conditions, or any particular aspect of them, must be justified by

compelling governmental necessity to pass constitutional muster.

1. In determining the extent to which individual liberties are afforded substantive protection from government regulation, the Court has been careful to avoid assuming the role of a " 'superlegislature to weigh the wisdom of legislation.' " *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963), quoting *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). A cautious sensitivity to the very legitimacy of any application of the Due Process Clause to impose substantive, as contrasted with procedural, restrictions on government action frames the backdrop to the Court's "substantive due process" decisions. See, *e.g.*, *Whitney* v. *California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); *Moore* v. *City of East Cleveland*, 431 U.S. 494, 537-538 (Stewart, J., dissenting); *id.* at 542-544 (White, J., dissenting).[17]

Thus, while the Court has articulated a broad range of interests that come within the concept of

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[17] Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation * * *.

Moore v. *City of East Cleveland*, 431 U.S. 494, 543 (White, J., dissenting). See also *Adamson* v. *California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

"liberty" [18] and has stated that these aspects of liberty may not be subjected to "arbitrary [restraints that are] without reasonable relation to some purpose within the competency of the State to effect," *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923); see *Kelley* v.

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[18] An initial inquiry in every case involving a claim to due process protection is whether an interest in "life, liberty, or property" has been affected by the challenged governmental action. U.S. Const. Amend. V; *Ingraham* v. *Wright*, *supra*, 430 U.S. at 672; *Paul* v. *Davis*, 424 U.S. 693, 711-712 (1976). The Court's decisions initially suggested an expansive content to the concept of liberty protected under the Due Process Clause:

> [Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. *Nebraska*, 262 U.S. 390, 399 (1923). In the process of determining the extent to which the Due Process Clause of the Fourteenth Amendment incorporated the restrictions of the Bill of Rights to state action, the Court's decisions suggested that only liberties that are fundamental or " 'implicit in the concept of ordered liberty' " became secure from state interference. See *Adamson* v. *California*, 332 U.S. 46, 54 (1947), quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). Nonetheless, the court has recently approved the analysis of Justice Harlan, dissenting in *Poe* v. *Ullman*, 367 U.S. 497, 542-543 (1961), that "liberty" "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints * * *." See *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977); *id.* at 545 (White, J., dissenting). See also *Ingraham* v. *Wright*, *supra*, 430 U.S. at 673, quoting with approval *Meyer* v. *Nebraska*, *supra*, 262 U.S. at 399.

Johnson, 425 U.S. 238, 247 (1976); *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 30-31, 35-37 (1905), the Court has recognized that it is ordinarily inappropriate for the judiciary to substitute its evaluation of the need for and utility of legislation or administrative regulation for the determination made by the politically responsible branches of government. *E.g.*, *Whalen* v. *Roe*, 429 U.S. 589, 597 (1977); *Olsen* v. *Nebraska ex rel. Western Reference & Bond Association*, 313 U.S. 236, 246 (1941). Thus, it has been stated that the "liberty" ordinarily protected from governmental intrusion by the Due Process Clause is not freedom from all forms of government restriction, but instead freedom from arbitrary and purposeless government action. *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion); *id.* at 547 (White, J., dissenting). See also *Meyer* v. *Nebraska*, *supra*, 262 U.S. at 400.

At the same time, however, where the legitimacy of the courts' substantive function under the Due Process Clause has been anchored in a textual limitation on the powers of government established by other specific provisions of the Constitution, such as the right of free speech or the right of assembly, the Court has required more than "a mere showing of a legitimate state interest" to justify legislation "that broadly stifles the exercise of fundamental personal liberties." *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973); *Bates* v. *City of Little Rock*, 361 U.S. 516, 524 (1960). Government action interfering with such fundamental constitutional liberties must be supported by a "compelling" justification of governmental necessity. See, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 155 (1973); *Stanley* v. *Georgia*, 394 U.S. 557, 563-564 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969); *Griswold* v. *Connecticut*, 381 U.S. 479, 481-486 (1965). This heightened judicial protection against governmental interference with liberties that are explicitly guaranteed by the Constitution has also been thought applicable under the Due Process Clause to those "peripheral rights" that are necessary to "mak[e] the express guarantees fully meaningful." *Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965). On this basis, it has been held that the liberty interests that are "fundamental" and entitled to searching judicial scrutiny include not only the right of association, *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960), the right to free speech, *Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969), the right to vote, *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972), and the right to interstate travel, *Shapiro* v. *Thompson*, 394 U.S. 618, 629-630 (1969); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505 (1964), but also a freedom of personal choice in matters of marriage and family life that is inherent within the several limitations on governmental authority over private conduct established by the Bill of Rights. *Griswold* v. *Connecticut*, 381 U.S. 479, 485-486 (1965) (marital relationship). See, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 152-153 (1973) (abortion); *Meyer* v. *Nebraska*, *supra* (child rearing and education).

While an interest need not be specifically guaranteed by the Constitution in order to come within the sphere of "liberty" protected by the Due Process Clause (see note 18, *supra*), those aspects of personal freedom that are considered so fundamental as to justify strict judicial scrutiny are nevertheless sharply limited. The Court has held that even important personal interests that are basic to economic and social life fall outside the area of special judicial competence and protection where the right is not "explicitly or implicitly guaranteed by the Constitution." *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 33 (1973) (education). See also *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976) (employment); *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972) (decent housing); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (welfare benefits).

We are aware of only one context in which the Court has recognized a category of personal interests that, although not "fundamental" within the meaning described above, are nonetheless afforded enhanced judicial protection under the Due Process Clause. In *Moore* v. *City of East Cleveland*, *supra*, the Court held invalid under the Due Process Clause a single-family zoning ordinance that narrowly defined the types of relatives that may live together as a "family" and thus materially interfered with "the choice of [relatives] * * * to live together." 431 U.S. at 512.[19]

[19] Justice Stevens concurred on the separate basis that the zoning ordinance was an arbitrary interference with the homeowner's right "to use her own property as she sees fit." 431 U.S. at 513, 514. Chief Justice Burger and Justices Stewart, White and Rehnquist dissented.

Justice Powell noted in the plurality opinion that although the interest that relatives possess in living together is technically different from a parent's "freedom of choice with respect to childbearing," [20] or "the rights of parents to the custody and companionship of their own children," [21] or the "traditional parental authority in matters of child rearing and education," [22] *id.* at 500-501,[23] nonetheless the freedom of relatives to live together is an interest that is "deeply rooted in this Nation's history and tradition," *id.* at 503, and "may not lightly be denied by the State." *Id.* at 506. Although a "compelling" justification for the state interference with this protected liberty interest was not required,[24] Justice Powell con-

[20] See *Roe* v. *Wade*, *supra*; *Griswold* v. *Connecticut*, *supra*.

[21] See *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972).

[22] See *Meyer* v. *Nebraska*, *supra*.

[23] As Justice Stewart observed in his dissent, *id.* at 534-538, the prior cases protecting family relations were premised on the belief that the associational interests at issue in these cases contributed to the enhancement of "substantively protected constitutional right[s]," *id.* at 538 (*i.e.*, First Amendment freedoms), or were " 'implicit in the concept of ordered liberty,' " *id.* at 537. See also *id.* at 549-550 (White, J., dissenting).

[24] By contrast, a "compelling" or "powerful countervailing interest" was required by the Court to justify governmental intrusion in marital or family privacy in the cases referred to by Justice Powell. *E.g.*, *Roe* v. *Wade*, *supra*, 410 U.S. at 155; *Stanley* v. *Illinois*, *supra*, 405 U.S. at 651. See also *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 485.

cluded that the Court "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499. Justice Powell analyzed the State's "legitimate goals" in single-family zoning and concluded that they were only "marginally" enhanced by the narrow definition of "family" in the ordinance. *Id.* at 500. While this evidence of governmental justification would ordinarily be sufficient to uphold government action affecting non-fundamental personal interests, see *id.* at 538 (Stewart, J., dissenting); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8 (1974), it was not adequate to withstand the heightened scrutiny invoked by the plurality in *Moore*.

The decision in *Moore* thus reflects some movement away from the two-tier classification of liberty between "fundamental" and "non-fundamental" interests, and suggests that a middle range of interests that are "deeply rooted in this Nation's history and tradition" may be entitled to enhanced, though not strict, judicial supervision. Even if the Court were to adopt such a mid-level scrutiny in particular contexts, it would nonetheless remain the rule that the government must demonstrate a "compelling" justification for its action only when a "fundamental" personal liberty has been infringed. Where "deeply rooted" personal interests that are less than "fundamental" are subjected to governmental regulation, the analysis in *Moore* suggests that a "particularly

careful scrutiny of the state needs asserted to justify their abridgement" may be called for;[25] it remains clear, however, that a compelling government objective is not required. 431 U.S. at 502, quoting *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

Accordingly, the conclusion of the court of appeals that every "restriction and privation" of pretrial confinement can be justified only by a compelling governmental necessity would be proper only if each "restriction and privation" imposed on pretrial detainees implicates a fundamental interest protected by the Constitution. For the reasons set forth below, this broad proposition cannot be sustained, nor, indeed, can it be shown that the particular privations involved in double-bunking invade such interests.

2. The initial decision to detain a person suspected of committing a crime involves, of course, a fundamental deprivation of personal liberty. But the government's right to impose this substantial deprivation is not challenged. While other means of assuring an accused's presence at trial are preferred under both

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[25] Professor Gunther has suggested that such an enhanced evaluation of the extent to which a legislative classification advances a legitimate governmental objective "in actuality, not merely in conjecture," may be appropriate under the Equal Protection Clause. Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 21 (1972).

constitutional and statutory provisions,[26] the legitimacy of pretrial detention has always been recognized as a necessary aspect of the government's responsibility to enforce the criminal law.[27] "'[T]he State's duty to control crime,'" *Gerstein* v. *Pugh*, 420 U.S. 103, 112 (1975), "justifies in the first instance the institution of pretrial detention." *Campbell* v. *McGruder*, 580 F.2d 521, 528 (D.C. Cir. 1978). Moreover, the accused receives the procedural protection of a judicial hearing and a determination of probable cause prior to commitment. *Gerstein* v. *Pugh*, *supra*.

The court of appeals did not dispute that the government permissibly may deprive a suspected criminal of his essential freedom to move at will in society pending his trial on the criminal charges. Nor did the court dispute that confining the individual in an institutional pretrial facility was an appropriate means of achieving the governmental objective. The court reasoned, however, that since a person committed to pretrial detention is presumed to be innocent, he retains the same liberties possessed by "unincarcerated individuals," subject only to such

[26] The Eighth Amendment prohibits excessive bail and federal statutes guarantee a right to the establishment of bail in non-capital cases. See *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951). The Bail Reform Act of 1966 established a liberal policy favoring pretrial release whenever conditions imposed upon release, including a bail bond, will "reasonably assure the appearance of the person as required." 18 U.S.C. 3146. See 18 U.S.C. 3148.

[27] See *Gerstein* v. *Pugh*, 420 U.S. 103, 114-116 (1975); 4 W. Blackstone, *Commentaries* 300.

restrictions as "inhere in confinement" or are justified by compelling governmental necessities. While the court emphasized that "[t]his standard of compelling necessity is neither rhetoric nor dicta" (Pet. App. 12a), the court provided scant guidance concerning the nature of the detainees' retained liberty interest that would invoke such an exacting scrutiny of the conditions of pretrial confinement.[28]

In large part, the court appears to rely on the "presumption of innocence" as a fundamental right that must be guarded from improper governmental intrusion. Reliance on the presumption of innocence does not, however, support the court's broad holding. The presumption of innocence is a procedural rule that allocates the burden of proof in criminal trials and, as such, is an aspect of the accused's right to a fair trial. *Taylor* v. *Kentucky*, No. 77-5549 (May 30, 1978), slip op. 5-12. Without denigrating the significance of the retained liberty interests of individuals in pretrial detention, we must agree with the observation of the Third Circuit that the pro-

[28] The authority from which the Second Circuit has derived its broad "compelling necessity" test is tangential at best. In *Detainees of the Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975), the court found authority for its test in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right of interstate travel), *Tate* v. *Short*, 401 U.S. 395 (1971) (equal protection violated by additional imprisonment based on inability to pay a fine), and *Shelton* v. *Tucker*, 364 U.S. 479 (1960) (teacher's First Amendment rights infringed by a school board policy requiring disclosure of personal associations). These cases fall far short of articulating any rationale for the Second Circuit's rule.

cedural guarantee of the presumption of innocence has no discernible relevance to the determination of the detainee's substantive rights during confinement. *Hampton* v. *Holmesburg Prison Officials, supra,* 546 F.2d at 1080 n.1.

We would not disagree, of course, that if some discrete condition of confinement could be identified that materially hampered the detainee's interest in obtaining a fair trial (of which the presumption of innocence is simply one subsidiary component), that particular aspect of confinement would be "constitutionally suspect and [could] be justified only by the most compelling necessity." *Campbell* v. *McGruder, supra,* 580 F.2d at 532. But there is no basis for an assumption (and the court of appeals did not conclude) that *every* "privation or restriction" during confinement has such an effect. To the extent that the court of appeals has relied on the presumption of innocence as the basis for its constitutional standard, the court's invocation of the "compelling necessity" requirement is thus plainly overbroad. Cf. *McDonald* v. *Board of Election,* 394 U.S. 802, 807-808 (1969). See also Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance,* 57 B.U.L. Rev. 462, 500 (1977).

It has been suggested that the presumption of innocence has at least some substantive content as "a shield that prevents 'the infliction of punishment prior to conviction.'" *Campbell* v. *McGruder, supra,* 580 F.2d at 529, quoting *Stack* v. *Boyle, supra,* 342

U.S. at 4.[29] But this theory also falls short of providing support for the broad substantive due process requirement formulated by the court of appeals in this case. It cannot reasonably be contended that every "restriction and privation" imposed during pretrial confinement amounts to punishment that may not constitutionally be inflicted prior to conviction for a crime. See *Bijeol* v. *Nelson,* 579 F.2d 423, 424 (7th Cir. 1978). This Court has often observed the distinction between punitive sanctions and regulatory restraints, and noted that the latter may be imposed without any finding of criminal guilt. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 167, 168 (1963) (citing cases).[30] If any particular aspect of pretrial

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[29] The court of appeals in *Campbell* did not suggest that a rule of compelling necessity was required to assure that punishment was not inflicted prior to conviction. Instead, the court stated that each pretrial restriction must be "carefully examined" to assure that it is justified by the government's legitimate interests (including security, fiscal economy and administrative feasibility) in maintaining pretrial detention facilities. 580 F.2d at 531. See page 45, *infra*.

[30] In determining whether sanctions or restrictions are punitive or regulatory, the Court emphasized the following criteria in *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 168-169 (footnotes omitted):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and

confinement constituted improper punishment under the standard articulated in these cases, it would, of course, be impermissible prior to conviction. Moreover, the government may not invoke the objective of punishment in support of general institutional practices and conditions of confinement for pretrial detainees.[31] But there is no basis for any assumption (and, again, the court of appeals did not find) that every institutional restraint during pretrial confinement will be designed for, or result in, punishment prior to conviction.

If a literal interpretation were given to the Second Circuit rule—that all restrictions and privations imposed during pretrial detention must be justified by a compelling necessity—the rule would thus sweep too broadly.[32] While it may be that some aspects of pre-

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whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

[31] By contrast, restrictions on convicted prisoners may be reasonably related to any valid penological objective such as deterrence of future crime, protection of society, and rehabilitation of the offenders, as well as to institutional concerns for security, order, and administrative feasibility. *Pell* v. *Procunier*, *supra*, 417 U.S. at 822-823. *See Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129-130.

[32] Although the court of appeals stated that its standard of compelling necessity is "neither rhetoric, nor dicta" (Pet. App. 12a), it is at least questionable whether the Second Circuit intended its rule to be applied vigorously. For example, the court upheld the restriction against detainees' possession of typewriters on the basis of the needs of "prison administration" (Pet. App. 33a). In any event, the court failed con-

trial confinement implicate interests that this Court has recognized as fundamental liberties (*e.g.*, First Amendment freedoms, see *Feeley* v. *Sampson*, 570 F.2d 364, 369 (1st Cir. 1978)), many "restrictions and privations" of confinement impinge only upon the inmates' understandable desire to live comfortably during detention (*i.e.*, possession or receipt of items of personal property). In other contexts not involving the impact on liberty associated with a confinement situation, this Court has determined that the important personal interests in housing or in basic economic well-being do not constitute fundamental interests requiring strict judicial scrutiny. *E.g.*, *Lindsey* v. *Normet*, *supra*; *Dandridge* v. *Williams*, *supra*.[33] Although it may be assumed that the government may not impose arbitrary restrictions or purposeless restraints on these personnel interests,[34] see *Moore* v. *City of East Cleveland*, *supra*, 431 U.S. at 502, the justification for government action affecting such interests need not be "compelling." Instead, under the traditional due process analysis employed by this Court, unless an institutional practice or condi-

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sistently to apply the approach of first determining the nature of the constitutional interest affected by the governmental restriction before determining the appropriate standard of governmental justification.

[33] And, of course, an individual's free exercise of rights over his property has not been thought fundamental, but rather subject to reasonable restriction.

[34] "There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Ingraham* v. *Wright*, *supra*, 430 U.S. at 674.

tion of confinement infringes a specific, fundamental constitutional guarantee, see *Campbell* v. *McGruder*, *supra*, 580 F.2d at 532 (right to a fair trial); *Feeley* v. *Sampson*, *supra*, 570 F.2d at 370 (First Amendment), the basic requirement of due process is satisfied if the condition or practice is reasonable in light of the valid government objectives in maintaining jail order and security and of substantial considerations of fiscal economy or administrative feasibility.[35] *Id.* at 370-371; *Main Road* v. *Aytch*, 565 F.2d 54, 57 (3d Cir. 1977); *Duran* v. *Elrod*, 542 F.2d 998, 999, 1001 (7th Cir. 1976); *Padgett* v. *Stein*, 406 F. Supp. 287, 295 (M.D. Pa. 1975). See also *Campbell* v. *McGruder*, *supra*, 580 F.2d at 531.

We do not mean, by pointing out that many conditions of confinement impinge on liberty interests of a kind that have not been considered fundamental and therefore need not be justified by a showing of compelling necessity, to suggest that the retained liberty interests of pretrial detainees are insignificant or that they may be constricted by administrative whim. While the most fundamental aspect of the liberty of an accused individual committed to pretrial confinement—his right to move freely in society at large like his fellow citizens—has been extinguished by the proceedings leading to his commitment, he nevertheless retains significant liberty interests that are not en-

[35] Fiscal constraints and administrative convenience would not suffice to justify the curtailment of fundamental liberties. *Milliken* v. *Bradley*, 433 U.S. 267, 291 (1977); *Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973).

joyed by those who have been convicted. His situation is closely comparable to that of a person confined after a civil commitment proceeding. In that analogous context, the Court has stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972). See *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245, 249-250 (1972).

The courts of appeals have generally agreed that the essential objective of pretrial confinement is to insure the detainees' presence at trial. *E.g.*, *Feeley* v. *Sampson*, *supra*, 570 F.2d at 369; *Patterson* v. *Morrisette*, 564 F.2d 1109, 1110 (4th Cir. 1977); *Duran* v. *Elrod*, *supra*, 542 F.2d at 999-1000; *United States ex rel. Tyrrell* v. *Speaker*, 535 F.2d 823, 827 (3d Cir. 1976).[36] As the court noted in *Campbell* v. *McGruder*, *supra*, 580 F.2d at 529, however:

> If the government could confine or otherwise infringe the liberty of [pretrial] detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention.

[36] Since persons committed to pretrial detention have not been judged guilty of any crime, administrative restrictions and other conditions of pretrial confinement may not be justified by penological objectives such as deterrence of future crime, protection of society or rehabilitation of offenders. *Feeley* v. *Sampson*, *supra*, 570 F.2d at 369 n.3. See also note 31, *supra*.

Thus, recognition of the legitimacy of the practice of pretrial detention requires further that recognition be given to the government's legitimate interest in managing "the institution of pretrial detention in an administratively feasible manner." *Campbell* v. *McGruder*, *supra*, 580 F.2d at 529. In accomplishing the important governmental interest in producing the detainee for trial, the government must "make the everyday administrative decisions necessary to run" jails as places of pretrial confinement, *ibid.*, adopt rules to "maintain the security of the jail, [and] generally [seek] to sustain the institution of pretrial detention at a feasible cost." *Id.* at 531.[37] Where conditions of confinement not affecting fundamental constitutional guarantees are challenged under the Due Process Clause, it is the reasonableness of the practices that must be considered in determining whether they should be sustained, and the reasonableness must be assessed in light of these valid governmental objectives. *Ibid.*; *Feeley* v. *Sampson*, *supra*, 570 F.2d at 370-371; *Main Road* v. *Aytch*, *supra*, 565 F.2d at 57.

We do not mean to suggest that jail administrators should be allowed to justify any condition of confine-

[37] It is difficult to perceive any limit to the court of appeals' proposition that administrative feasibility and fiscal economy may not be considered in evaluating the constitutionality of conditions of pretrial confinement (Pet. App. 13a). The test adopted by the court of appeals simply assumes for the judiciary the task of legislating the portion of the public fisc to be allocated to the comfort and privacy afforded to persons confined to institutional life.

ment merely by claiming some connection, however tangential, with the needs of jail management. In determining whether the conditions are justified by considerations of cost and feasibility, we think that the existence of more suitable alternatives would properly bear on the reasonableness of the decision of jail authorities to adopt the challenged practice. See *Feeley* v. *Sampson*, *supra*, 570 F.2d at 374. Moreover, there may be occasions, as the court of appeals suggested in *Campbell* v. *McGruder*, *supra*, 580 F.2d at 531, where the practice impinges on particularly substantial liberty interests whose character is such that the courts should examine with particular care the governmental justifications to assure that they support the particular restriction involved.[38] And, as

[38] The court of appeals in *Campbell* noted that "infringements on liberties not deemed fundamental might not in general be subject to the strictest scrutiny." 580 F.2d at 531. The court suggested, however, that some form of enhanced scrutiny of the sufficiency of the governmental justification for practices involving pretrial detention is justified to protect the presumption of innocence and the detainees' right not to be punished until proven guilty. 580 F.2d at 531. To assure that the various restrictions and privations imposed on pretrial detainees do not accumulate to constitute prohibited punishment, the court concluded that a careful examination of the reasonableness of the government's purpose is required. *Ibid.*

This formulation of the appropriate standard of review parallels Justice Powell's description of the enhanced scrutiny appropriate under the Due Process Clause where governmental action affects personal liberties that are "deeply rooted" in the Nation's history and tradition. *Moore* v. *City of East Cleveland*, *supra*, 431 U.S. at 503. See pages 32-35, *supra*.

we indicated at the outset (pages 24-25, *supra*), in each challenge to a condition of pretrial confinement under the Due Process Clause, the government must show that the restrictions imposed satisfy requirements of basic decency and are accomplished in a "reasonable, and hence humane, manner." *Feeley* v. *Sampson*, *supra*, 570 F.2d at 370.

The due process analysis adopted by the court of appeals in this case, however, too broadly requires a "compelling" justification for all "restrictions and privations" of confinement. The court's decision improperly circumscribes the governmental interests that may justify, as reasonable, the practices and conditions of pretrial detention.

3. The difficulties inherent in the due process analysis of the court of appeals are illustrated in its evaluation of the practice of double-bunking in residential rooms at the MCC. The court stated that the government must demonstrate a "compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling" (Pet. App. 17a). But the court's invocation of a retained right to privacy for pretrial detainees does not justify its refusal to consider the government's legitimate administrative and fiscal justifications for double-celling.

The cases in this Court that have defined certain privacy interests as fundamental have never suggested that the interest requires a literal, physical separation of individuals, especially in the context of institutional care or confinement. As the Court ex-

plained in *Whalen* v. *Roe*, 429 U.S. 589, 598-600 (1977):

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

The right to privacy has been drawn from several specific constitutional guarantees which together shelter activities that take place within " 'the sanctity of a man's home,' " *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 484; *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 66 n.13 & 67 (1973), and areas of personal and family decision-making, *Roe* v. *Wade*, *supra*, 410 U.S. at 152-153; see *Paul* v. *Davis*, 424 U.S. 693, 712-713 (1976). There is no basis in the reasoning of these cases to support an extension of the constitutional privacy interest to include a right to be separated from other persons during confinement in a jail or other institution.[39]

Although the detainees' interest in personal privacy during pretrial confinement is not within the consti-

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[39] The conclusion that privacy interests have generally diminished scope in the jail context is consistent with *Lanza* v. *New York*, 370 U.S. 139, 143 (1962), where the Court, in assessing a Fourth Amendment claim, observed that "a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." See also *United States* v. *Hearst*, 563 F.2d 1331, 1345 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978); *United States* v. *Strumes*, 549 F.2d 831 (8th Cir. 1977); *United States* v. *Dawson*, 516 F.2d 796 (9th Cir. 1975).

tutional privacy right identified as fundamental by this Court, it nonetheless represents an aspect of individual liberty that we would not denigrate. If this Court is prepared to adopt the view of the plurality in *Moore* that there is a narrow category of interests that, although not fundamental, are so profoundly anchored in the traditions of our society that their restriction must be examined with particular care by the courts, it may conclude that the interest in privacy and human dignity implicated by housing pretrial detainees or civil committees in relatively confined, non-private quarters is such an interest. But such an approach would only justify an insistence that the restriction be shown by the government to be fairly and substantially related to its valid interests. It affords no basis for elevating the detainee's interests in comfort and privacy to the dimension of a fundamental constitutional right protected from governmental infringement except upon a showing of compelling governmental necessity. See *Whalen* v. *Roe*, *supra*, 429 U.S. at 600; *Paul* v. *Davis*, *supra*, 424 U.S. at 713.

If no consideration could be given to fiscal or administrative constraints in determining appropriate conditions of pretrial confinement, it is difficult to articulate any limit to the court of appeals' application of its "privacy" concept: a *per se* ban on the use of any room to hold more than one inmate could logically result. Even the court of appeals, however, has not extended its reasoning to dormitory rooms, having instead indicated that they may be used to house 10

or more inmates (Pet. App. 21a-23a). In the context of pretrial detainees' housing conditions significantly affecting personal privacy, the requirements of due process should thus be satisfied if the conditions of confinement are carefully examined and found to satisfy a minimum threshold of decency and humane treatment and to be reasonable in light of the government's substantial administrative and fiscal concerns. See *Feeley* v. *Sampson*, *supra*, 570 F.2d at 374; pages 44-46, *supra*.

B. The Courts Below Erred In Concluding, On A Motion For Summary Judgment, That Double-Celling of Pretrial Detainees At The MCC Violates The Due Process Clause

Although an inquiry into the reasonableness of government action necessarily entails a factual examination of the means employed and their relationship to legitimate government objectives, the courts below conducted a very limited analysis of the particular circumstances justifying the practice of double-bunking in the residential rooms of the MCC. Indeed, the court of appeals expressly refused to consider the administrative and fiscal interests of the government in its evaluation of the permissibility of the practice (see Pet. App. 12a, 19a). The court thus disregarded efforts made by the Bureau of Prisons to stem the unprecedented flow of inmates into the facility (pages 6-7, *supra*) and the need to retain inmates at the MCC for the convenience of their trials in nearby courts. The court also gave no consideration to the fiscal restraints within which

the Bureau operates or to the costs that would be incurred in altering operating procedures or in using or constructing additional facilities. Nor did the court consider the fact that the enhanced capacity of the MCC facility obtained by double-bunking permits more pretrial detainees to be maintained in the New York area, close to their homes, families, and attorneys, rather than dispersed to federal correction facilities in distant locations primarily designed for convicted inmates.[40] Since these concerns are critical to the determination of whether double-bunking in the residential rooms at the MCC was a reasonable, nonarbitrary administrative response to the needs of jail management, *e.g.*, *Campbell* v. *McGruder*, *supra*, 580 F.2d at 531; *Feeley* v. *Sampson*, *supra*, 570 F.2d at 371, it was error for the court of appeals to exclude them from consideration.

Nor does the record in this case support any conclusion, on a motion for summary judgment, that the practice of double-bunking as employed at the MCC fails to provide minimally decent and humane living conditions. See *Feeley* v. *Sampson*, *supra*, 570 F.2d at 371. Although the government maintained in the district court that the question whether double-bunking in the residential rooms affords minimally decent accommodations involves material issues of fact that remain in dispute (Pet. App. 202a), the

[40] Indeed, there is no basis in the record even for concluding that a majority of the inmates themselves would prefer single-celling in the face of the changes in other conditions that might accompany elimination of double-celling.

government nonetheless submitted the affidavit of an experienced correctional psychologist who concluded that " 'double bunking' as practiced at the MCC should not have any significant detrimental effects on the physical or psychological health of the inmates at that institution" (A. 31-32).[41] The factors that led to this conclusion were (A. 32):

> (a) the architectural design and finish of the residential rooms and common areas which convey a non-penal atmosphere and a sense of openness; and (b) the limited period of confinement of any given inmate to the room itself, both in terms of time each day (locked in only for sleeping hours and two court periods), and length of stay (majority of pre-trial inmates are in the MCC 20 days or less).

The affidavit stated further (*ibid.*):

> Although the area of some of the residential rooms used for double-bunking may not be ideal, I have not seen any evidence that the "double-celling" practice at the MCC has caused any untoward effects on individual inmates. It does not appear to be psychologically destructive or an unacceptable deprivation of privacy; and there is no evidence it has prompted any increase of

[41] This case differs from *Campbell* v. *McGruder*, *supra*, which involved smaller and less pleasant rooms in a traditional cell block environment. In *Campbell* there was an express finding that double-celling in those restrictive conditions " 'results in both physical and psychological damage to the inmates * * *.' " 580 F.2d at 536.

deviant sexual or aggressive impulses or tendencies.

The district court reasoned, however, that even though the government's affidavit was unrebutted by any testimony or contrary expert evidence in the record of this case (see note 9, *supra*), it was unnecessary to consider evidence on the issue of the physical or psychological effects of double-celling at the MCC (Pet. App. 210a-211a). The district judge inspected the residential rooms at the MCC and noted that some of them were "musty and unpleasant smelling" and that each possessed a single open toilet (Pet. App. 207a). The court concluded that no testimony was needed to assist its judgment as to the "humiliation and denials of minimal privacy" inherent "when two people are thrown into single cells like these" (Pet. App. 211a). The court stated that it was not required to litigate general propositions about matters of human experience (Pet. App. 211a) because "this case is controlled by the principles of *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392 (2d Cir. 1975), and a growing list of decisions condemning double celling as unconstitutional" (Pet. App. 207a).

The court of appeals upheld the grant of summary judgment, stating that "[t]he infringements on privacy and personal dignity" observed in the *Detainees* case are "inherent in double-celling in rooms intended for one individual * * *." (Pet. App. 17a-18a, 18a-19a.) The court emphasized that inmate testimony in the *Detainees* case (*id.* at 18a, as amended by *id.* at 41a)

revealed that double-celling had produced numerous disagreements over the choice of activities within the room, and had spawned fights, charges of theft, and frequent involuntary physical contact as two inmates passed each other in the narrow aisle of walking space.

But the conditions presented by double-bunking in the residential rooms at the MCC are markedly different from those observed in *Detainees*. The cells involved in *Detainees* were only 40 square feet in size; most of the residential rooms at the MCC are 70-80 square feet, while others are substantially larger. (Compare Pet. App. 208a, 212a with 520 F.2d at 395.) Pretrial detainees at the MCC are confined to their rooms for only 7-8 hours per day (or about half as long as in the *Detainees* case), during most or all of which they are presumably asleep, and their rooms open into modern and well-decorated multipurpose facilities instead of long barren passageways as in *Detainees*. (Compare Pet. App. 208a with 520 F.2d at 395.) While the record in *Detainees* reflected substantial inmate discomfort associated with the harsher conditions at that jail, there was no evidence before the court to justify any similar conclusion in this case. Indeed, the unrebutted affidavit of the government's psychiatric expert stated that the practice of double-bunking in the residential rooms at the MCC was neither physically nor psychologically injurious and did not impose "an unacceptable deprivation of privacy" (Pet. App. 210a).

In sum, the record before the district court provided no basis for a conclusion that the double-

bunking of pretrial detainees as implemented at the MCC either fails to afford minimally decent and humane conditions [42] or was unreasonable in light of a careful examination of legitimate administrative and fiscal requirements. Rather than imposing, in effect, a rule that double-celling is *per se* unconstitutional, the court of appeals should have vacated the entry of summary judgment and remanded for a more particular evaluation of the nature of and justification for the practice in the precise context of the MCC."

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[42] In this regard, it is noteworthy that the court of appeals reversed the district court's holding that double bunking in the residential rooms at the MCC was unconstitutional for sentenced inmates. The court noted that the record was insufficient to support a finding that double-celling at the MCC fell below the minimum standard of adequate housing required by the Eighth Amendment (Pet. App. 20a). Other courts that have considered this issue have concluded that the requirement of minimal decency for pretrial housing conditions is essentially equivalent to the Eighth Amendment standard. See page 24, *supra*. There is thus no basis, either in law or on the record of the case, for the court to have reached a different disposition with regard to pretrial detainees in this case.

[43] As was stated in our petition (Pet. 16-17 n.13), the Attorney General has established a Federal Corrections Task Force in the Department of Justice to formulate recommendations for national corrections standards and a federal corrections policy regarding conditions of confinement for both sentenced prisoners and pre-trial detainees. Draft Federal Standards have been issued by the Task Force. Among the various provisions of the draft Standards is a proposal that all cells and detention facilities that have been "rated" for single occupancy should be used to house only one inmate. If this proposal were to be adopted, it would be implemented over a reasonable period of time, and the rated capacity of the facility would be subject to periodic review.

As of the date of this filing, the draft standards remain under continued study within the Department of Justice and have not been adopted by the Attorney General. The draft standards expressly note that they intend to confer no rights or legal cause of action. If the proposed standards, or an amended version of the standards, are at some time adopted by the Department, they would not purport merely to satisfy constitutional minima, but to represent an adoption of liberal administrative goals. By contrast, this case raises the claim that single occupancy of the residential rooms at the MCC is compelled by the Due Process Clause of the Fifth Amendment to the Constitution.

II

REGULATIONS THAT ARE REASONABLY RELATED TO THE GOVERNMENTAL INTEREST IN MAINTAINING JAIL SECURITY AND ORDER MUST BE UPHELD

In its evaluation of institutional restrictions that are designed to promote security and order at the MCC, the court of appeals took a different approach than with other challenged conditions. The court recognized that maintenance of security and order is a compelling or inherent necessity of jail administration, and it stated that an "institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded" (Pet. App. 12a-13a). The court noted that under this Court's decision in *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, the administrative determination as to the needs of institutional security and order

is entitled to substantial deference and acknowledged that the courts should not "second-guess the expert administrators on matters on which they are better informed" (Pet. App. 13a). In reviewing several specific institutional security practices claimed to abridge the constitutional rights of inmates at the MCC, however, the court of appeals rejected the determination of correctional officials that the challenged practices serve the facility's substantial interest in security and order. The court held that these security practices were unjustified interferences with the retained constitutional rights of both detainees and convicted inmates, and it enjoined further application of the rules at the MCC.

While the court of appeals purported to follow the principle of deference to correctional judgment in matters of security established in *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, we submit that the court's holdings in fact constitute, on the record of this case, an impermissible intrusion into the affairs of jail management. We do not dispute that convicted prisoners and pretrial detainees alike retain those constitutional rights that are consistent with the nature of their confinement, and that courts must guard against unwarranted interference with these retained interests. *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974). In the case of pretrial detainees, moreover, as we have indicated (pages 23-25, *supra*) these rights encompass retained due process liberty interests not possessed by convicts. Nonetheless, this Court has noted that there are cer-

tain "limitations on constitutional rights * * * which are implicit in incarceration," *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 125, and that both First and Fourth Amendment rights during confinement must be evaluated "in light of the special characteristics of the * * * environment." *Procunier* v. *Martinez*, *supra*, 416 U.S. at 410, quoting *Tinker* v. *Des Moines School District*, 393 U.S. 503, 506 (1969). See also *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129; *Pell* v. *Procunier*, *supra*, 417 U.S. at 822; cf. *Healy* v. *James*, 408 U.S. 169, 189 (1972).

One of the essential characteristics of institutional confinement that has been recognized to be of "central" importance is the need to preserve internal security and order. *Pell* v. *Procunier*, *supra*, 417 U.S. at 823. It is a basic requirement of institutional life that the safety of inmates and correctional personnel be preserved and that the facility be safeguarded from escape. Indeed, if administrators were disabled from imposing reasonable restrictions designed to preserve the safety and order of the institution, successful operation of a jail or prison would not be possible. Accordingly, even when an institutional restriction impinges on basic constitutional freedoms, such as the right of free speech, if the practice is reasonably related to the central objective of maintaining jail security and order, it should be upheld. *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129-130; see *Campbell* v. *McGruder*, *supra*, 580 F.2d at 531.

In this connection, it is appropriate to accord substantial deference to the expertise of qualified correctional officials in the determination of institutional security requirements."[44] *Pell* v. *Procunier*, *supra*, 417 U.S. at 826-828; see also *Feeley* v. *Sampson*, *supra*, 570 F.2d at 373. Moreover, in weighing the legitimacy of security concerns, the burden is not on correctional authorities to show affirmatively that elimination of a particular restriction would be detrimental to the maintenance of security or order. *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128. Instead, courts should ordinarily defer to the expert judgment of correctional administrators and limit judicial inquiry to those occasions when "substantial evidence" indicates "that the officials have exaggerated their

[44] Several experienced and highly qualified correctional authorities testified to explain the necessity for the challenged security practices at the MCC. These included Norman A. Carlson (Director of the Bureau of Prisons; previously Executive Assistant to the Director of the Bureau of Prisons and case supervisor at the federal penitentiaries at Leavenworth, Kansas, and Ashland, Kentucky) (J.A. 2281) and Larry F. Taylor, the Warden of the MCC, the officials responsible for evaluating and implementing security practices at the federal facility. Also testifying on petitioners' behalf were Dr. George M. Camp (Deputy Commissioner of New York State Division of Criminal Justice Services; previously the Director of Missouri Correctional Services and Assistant Commissioner of Corrections for New York City) (J.A. 1379-1380), and Roberts Wright (Associate Executive Director of American Correctional Association; previously the Warden of Westchester County Penitentiary; Member of the New York State Board of Parole and Commissioner of Corrections of Westchester County) (J.A. 1527), who provided an independent evaluation of the security measures at the MCC based upon their experience at other facilities.

response" to the security risks occurring during institutional confinement. *Ibid.*; *Pell* v. *Procunier*, *supra*, 417 U.S. at 827.

The fact that both pretrial detainees and convicted inmates are affected by the security measures at the MCC should not alter this basic analysis, and indeed the court of appeals did not differentiate between the constitutional claims of pretrial detainees and convicted inmates in reviewing the challenged security practices. The paramount institutional concern for preserving the safety of inmates and correctional personnel and safeguarding the facility against escape applies equally to pretrial confinement and convicted incarceration. *Main Road* v. *Aytch*, 565 F.2d 54, 57 (3d Cir. 1977); see also *Campbell* v. *McGruder*, *supra*, 580 F.2d at 531. There is no basis for any assumption that pretrial detainees pose any lesser security risk; indeed, the evidence indicates that the security difficulties are at least as great in pretrial confinement as in convicted incarceration.[45]

[45] While people charged with but not convicted of crimes are presumed to be innocent, that presumption does not in any way ease the task of the jail administrator. Prudence dictates that the jail administrator assume that pretrial detainees pose much the same risk to jail security and order and risk of escape as convicted inmates. Indeed, pretrial detainees constitute a subset of those charged with crime that may reasonably be thought to pose more significant security risks, since their detention has been ordered after a bail hearing at which money bail has been set only for individuals whose appearance cannot be reasonably assured by any less drastic condition. 18 U.S.C. 3146. As a result, those who are detained prior to trial are often individuals charged with serious crimes or with records of prior offenses. Addi-

And the expertise required to evaluate the need for particular security practices in both contexts is possessed by correctional administrators rather than the courts. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128. Accordingly, other courts have held, as the court of appeals assumed in this case, that when institutional security is the justification for a given restriction, even though fundamental constitutional rights may be implicated, there is no basis for distinguishing pretrial detainees from convicted inmates. *Feeley* v. *Sampson*, *supra*, 570 F.2d at 371, 373; *Main Road* v. *Aytch*, *supra*, 565 F.2d at 57; *United States* v. *Hearst*, *supra*, 563 F.2d at 1345-1346 n.11.

The court of appeals was thus correct in stating that, with regard to both pretrial detainees and convicted inmates, the "institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded" (Pet. App. 12a-13a). The court also correctly observed that the courts should not "second-guess the expert administrators on matters on which they are better informed" (*id.* at 13a). The court failed, however, properly to

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tionally, unlike the situation in more long-term correctional facilities, the inmate population at a pretrial facility is transient and has not been screened by individualized classification procedures used in connection with convicted prisoners. The specific likelihood of particular detainees being a greater or lesser security risk is not ordinarily established. Prudent security practice thus requires that correctional officials adopt measures that will avert both high and low risk security breaches at pretrial facilities. (J.A. 1393-1398, 1531-1532).

apply these principles in its evaluation of the several specific security restrictions challenged in this case.

A. The Rule Forbidding Receipt Of Packages From Outside The Jail Was Shown To Be A Reasonable Response To Valid Security Concerns

Inmates at the MCC are not permitted to receive packages from outside the facility containing items of food or personal property. Government corrections officials testified in the district court that the restriction on the receipt of such packages was necessary to avoid fighting, stealing, and extortion among inmates, and also to limit the introduction of items of contraband into the facility.[46] These officials testified to the serious opportunities that packages provide for the undetected concealment of contraband items, noting that problems range from "the traditional file in the cake" to the concealment of drugs "in heels of shoes, [or] seams of clothing" (A. 80). The Warden observed that the inspection process would constitute an enormous drain on staff resources and that even a thorough inspection would not reliably detect concealed items (A. 67; see *id.* at 80, 85). He also noted that the introduction of personal property into the jail increases the risks of thefts and inmate conflict (A. 67-68, 79).

The district court dismissed these security concerns as "dire predictions" (Pet. App. 162a) and held that the MCC's restriction against receipt of packages was

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[46] The testimony also noted the storage and sanitation problems that would result from the introduction of food packages (A. 67, 80).

arbitrary and capricious (*id.* at 163a-164a). The court stated that both convicted inmates and pretrial detainees should "be free to retain or receive at least items of the kind available on order from the [MCC's] commissary" (*id.* at 166a) and directed the MCC to promulgate "suitable regulations" regarding the receipt of packages (*ibid.*). The court of appeals affirmed the findings of the district court, adding only that more permissive rules exist at other facilities and that there is "no indication that this greater liberality has resulted in unmanageable difficulties" (*id.* at 32a-33a).

Neither of the courts below identified the constitutional nature of the inmates' interest in receiving packages containing items of personal property while in custody. There is no suggestion in either of the opinions below that restrictions on the use of property in this context implicate any fundamental liberty, such as the right of free speech or expression. Nor do they, in our view, impinge upon basic aspects of privacy or human dignity that we have suggested above might justify careful judicial evaluation. In any event, assuming that an interest in liberty or property is implicated by the challenged restriction, the record affords no support for the courts' conclusion that the restriction on the receipt of packages at the MCC is unreasonable.

Corrections officials testified to the serious security concerns justifying the restriction on the receipt of packages at the MCC. The contrary determination of the district court simply represents its disagree-

ment with the judgment of jail officials regarding the security problems that exist and the means required to control them (see Pet. App. 32a). But it is precisely this sort of unguided substitution of judicial for administrative judgment as to the needs of institutional security that this Court has held to be inappropriate. The unrebutted testimony in this case was that the problems of security and order would be significant if packages were allowed at the MCC. There was no "substantial evidence" in the record, or indeed any evidence at all, indicating that the testimony of the correctional experts was disingenuous or exaggerated. *Jones* v. *North Carolina Prisoners' Labor Union, supra*, 433 U.S. at 128. *See also Guajardo* v. *Estelle*, 432 F. Supp. 1373, 1386 (S.D. Tex. 1977) ("the potential security risk from packages is substantial and * * * problems of inspection are severe"). In this situation, the institutional restriction should have been upheld: "It is enough to say that [the corrections officials] have not been conclusively shown to be wrong." *Jones* v. *North Carolina Prisoners' Labor Union, supra*, 433 U.S. at 132.[47]

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[47] The court of appeals should have applied here the same analysis it applied in a subsequent portion of its opinion in concluding (Pet. App. 33a) that

> the MCC's judgment that the particular problems of security, storage, and theft arising from inmates' ownership of typewriters must override the desire of some to possess them.

The same principle of deference to correctional judgment applies whether typewriters or other items of personal property are involved.

The court of appeals' suggestion that other institutions allow receipt of packages without any "indication" of "unmanageable difficulties" (Pet. App. 33a) does not constitute adequate evidence that the Bureau's concerns for security in this regard are unreasonable or exaggerated. See *Jones* v. *North Carolina Prisoners' Labor Union, supra*, 433 U.S. at 132. The absence of testimony concerning difficulties encountered at other institutions is not "substantial evidence," or indeed "evidence" at all, in the record of this proceeding. Moreover, the statement of the court of appeals establishes, at most, that some other facilities may regard the security risks as more manageable.[48] This conclusion is not, however, universally shared. See *Guajardo* v. *Estelle, supra*, 432 F. Supp. at 1386. As the First Circuit noted in an analogous context, there may often be "legitimate differences of opinion among state and local authorities as to what practices are safe within their particular institutions." *Feeley* v. *Sampson, supra*, 570 F.2d at 373. The unrebutted testimony in this case was that the security problems would be significant if packages were allowed at the MCC. The determination of correctional authorities that "there is potential danger" in allowing the receipt of packages should not have been dismissed as arbitrary and capricious by the

[48] In view of the limited nature of the individual interest involved in this context, the restriction on packages at the facility would be justifiable even if the administrative interest was merely that of avoiding "manageable" burdens on security personnel.

court of appeals. See *Jones* v. *North Carolina Prisoners' Labor Union, supra*, 433 U.S. at 133 n.9.

Nor is the court's intrusion into matters of administrative judgment made defensible by the district court's ostensibly narrow requirement that the MCC adopt regulations to allow receipt of packages containing "at least items of the kind available on order from the [MCC's] commissary" (Pet. App. 166a). The security risks are created by the fact that packages arrive from outside the facility; ingenuity can be employed to conceal items of contraband and weapons in food and standardized personal items, as well as other kinds of property. Moreover, to the extent that packages contain only such personal items as are already made available to inmates in the facility's commissary, the requirement that packages containing such items be allowed into the facility increases security risks without achieving any practical difference in the inmates' living conditions. The court's decision has thus improperly overridden and injured the substantial administrative interest in security and order at the MCC without identifying any personal liberty interest advanced or protected by its action.

B. The Bureau Of Prisons Regulation That Restricts The Receipt By Inmates Of Hardback Books To Those Mailed Directly From Publishers Is A Reasonable Response To Security And Administrative Requirements

The courts below enjoined enforcement at the MCC of the Bureau of Prisons' "publisher only" rule. At the time this case was before the district court, this

rule, which applies to all Bureau facilities, permitted inmates to receive books and magazines only if the materials have been mailed directly from publishers.[49] Federal corrections experts testified in this case to the serious risk to security and order that results when bound materials are mailed to inmates from unidentified sources outside the facility. Hardback books are especially serviceable as a means for smuggling drugs or money into the jail; detection of items secreted in the bindings or between the pages of these materials is difficult, and a thorough inspection would often result in partial or total destruction of the materials (A. 24). The "publisher only" rule is designed to avoid this substantial problem of detecting hidden contraband while still accommodating the inmates' legitimate desire for access to reading materials. The courts below, however, rejected the Bureau's security and administrative justifications and invalidated the rule. The court of appeals held that the rule "significantly intrude[s]" upon the inmates' First Amendment rights (Pet. App. 26a) and concluded that the MCC could "adequately protect its legitimate interests merely by inspecting books and magazines for contraband" (*ibid.*).[50]

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[49] As recently amended, the rule allows receipt of such materials from bookstores as well as publishers. 43 Fed. Reg. 30576 (July 17, 1978). The Bureau is also in the process of changing the rule to allow receipt of paperback books and magazines from any source.

[50] The Second Circuit distinguished *Woods* v. *Daggett*, 541 F.2d 237 (10th Cir. 1976), which upheld the Bureau's "publisher only" rule, on the ground that that case concerned a maximum security facility (Pet. App. 26a-27a n.26). The court stated that the convicted inmates and pretrial detainees at the MCC pose a far smaller security risk (*ibid.*). There is nothing in the record to support this conclusion. Indeed, the testimony of Bureau of Prisons officials established that the risk of contraband smuggling at the MCC would be substantial without the "publisher only" rule (A. 24) and also noted that detainees and inmates pose equivalent security risks. See note 45, *supra*. The appropriate deference to correctional administrators allows them, and not the courts, to determine the needs of security in these situations. *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128.

The court of appeals erred initially in its conclusion that the "publisher only" rule meaningfully interferes with a substantial First Amendment interest. The rule allows books and magazines to be received if mailed from any publisher (and now from bookstores as well). There is no suggestion in the record that this alternative means of obtaining reading materials is burdensome or insufficient. See *Pell* v. *Procunier*, *supra*, 417 U.S. at 827-828. To the limited extent that the rule conceivably might increase the cost of obtaining published materials, this Court has held that where "other avenues" remain available for the receipt of materials by inmates, the loss of "cost advantages does not fundamentally implicate *free speech* values." *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 130-131 (emphasis in original). Furthermore, the MCC has a "relatively large" library for use by inmates, which mitigates any possible harshness of the rule (Pet. App. 26a-27a, 216a). In light of the alternative

channels that remain open for the receipt of materials by inmates and the fact that the rule "operates in a neutral fashion, without regard to the content of the expression," the "publisher only" rule does not materially affect the freedom of expression retained by inmates at the facility. See *Pell* v. *Procunier*, *supra*, 417 U.S. at 828.

Moreover, the court of appeals misplaced the burden of proof in rejecting the administrative and security justifications. Even assuming that First Amendment rights were marginally implicated by the challenged rule, the burden is not on the government to show that the rule is necessary to avert a "present danger" to security and order. *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128. Instead, the restriction should be upheld so long as the government's security concerns are reasonable and not shown by substantial evidence to be an exaggerated response. *Ibid.*; *Pell* v. *Procunier*, *supra*, 417 U.S. at 827.

The Bureau established its substantial need for strict supervision of these materials and the unmanageability of item-by-item inspection. In rejecting this evidence, the district court concluded only that the government's justification swept too broadly. The court stated that "[i]t is evident that * * * literature published in paper or soft covers does not present the danger [government witnesses] cite" (Pet. App. 215a). While it is our view that this conclusion is unsupported in the record of this case and is indeed inconsistent with the testimony that contraband may

be concealed between the pages of such materials, making administrative detection difficult, the Bureau has now proposed to amend its rule to allow the receipt of paperback books from any source. Accordingly, we do not ask this Court to review the district court's holding in the limited context of paperback books and soft covered materials.[51]

Assuming arguendo the correctness of the district court's conclusion with regard to the security risks presented by paperback and soft covered materials, the court's analysis does not in any event support a total invalidation of the Bureau's restriction on the receipt of published materials.[52] Specifically, there

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[51] Although the Bureau of Prisons proposes to amend its nationwide rule to allow the receipt of paperback books and soft covered materials from any source, the Bureau retains its concern that even exhaustive inspection of these materials cannot detect all concealed contraband. The Bureau regards hardback materials as the more dangerous source of risk to institutional security, however, and proposes to retain the "publisher only" rule in this limited context only.

[52] Any application of "overbreadth" analysis in this context to strike the entire regulation for its partial deficiency would be improper. The cases in which overbreadth analysis has been employed identify two interests to be protected. First, the doctrine may apply where the prohibition attacked is so vague in application that it occasions uncertainty for conduct entitled to special protection. See *Smith* v. *California*, 361 U.S. 147, 151 (1959); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940). Second, the doctrine is applied to modify ordinary rules of standing and ripeness to permit a litigant to raise the "chilling effect" of legislation on fundamental liberties as a basis for seeking an immediate adjudication of its validity. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965); *NAACP*

is no evidence or finding below that would support any conclusion that the rule, as applied to hardback books, is unjustified as a reasonable security precaution. Instead, the only evidence introduced on the issue indicates the reasonableness of the rule, at least with regard to hardback materials, as a moderate and limited response to a significant security concern. Even when weighed against the asserted First Amendment interest implicated by the restriction, "these institutional reasons are sufficiently weighty to prevail." [53] *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 133.

C. The Visual Body Cavity Inspection Conducted After Contact Visits Is A Reasonable Security Requirement

Inmates at Bureau of Prisons facilities, including the MCC, are required to expose their body cavities for visual inspection as part of the strip search conducted after contact visits with persons from outside the facility. The courts below held in this case that, unless there is probable cause to believe that the inmate is secreting contraband, this intrusive form of inspection violates the Fourth Amendment.

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v. *Button*, 371 U.S. 415, 433 (1963). But ripeness and standing are not at issue here, and the challenged regulation is not vague in effect. The scope of relief could properly be limited to an injunction against application of the rule to all but hardback materials. As is discussed in the text, there is no basis in the record for any broader ruling.

[53] The claimed restriction on First Amendment interests resulting from the "publisher only" rule, see page 67, *supra*, is materially attenuated by the availability of paperback books from any source under the Bureau's amended policy.

The district court and court of appeals recognized that both detainees and convicted inmates relinquish "some part of those rights to privacy and protection against unreasonable searches and seizures possessed by unincarcerated members of society," and that searches reasonably related to the security of custodial facilities must be permitted (Pet. App. 29a; see *id.* at 148a). See also *Lanza* v. *New York*, *supra*, 370 U.S. at 143; *Bonner* v. *Coughlin*, 517 F.2d 1311, 1316-1317 (7th Cir. 1975); *United States* v. *Savage*, 482 F.2d 1371, 1372-1373 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974). The courts concluded, however, that the evidence presented in this case revealed "little actual utility" to the practice (Pet. App. 30a), and that, in view of the intrusive nature of the search and the availability of less intrusive alternatives, the routine visual inspection of body cavities following contact visits was an unreasonable search procedure.

a. The court of appeals concluded that the visual inspection of body cavities following contact visits was of "little actual utility" because the government "proved only one instance in * * * several years [at the MCC] when contraband was found during a body cavity inspection" (Pet. App. 30a). Substantial evidence has been documented in this record (A. 74-76) and elsewhere (*e.g.*, *United States* v. *Park*, 521 F.2d 1381, 1382 (9th Cir. 1975)), however, of inmate attempts to secrete contraband items into an institution by concealing them in body cavities. The risk of such

attempts is especially significant following contact visits with persons from outside the correctional facility, because such visits "present a unique opportunity for passing contraband, including weapons and drugs, into the Jail." [54] *Feeley* v. *Sampson, supra*, 570 F.2d at 373. Correctional officials testified in this case that visual inspection of body cavities is necessary, as part of the strip search following contact visits, not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the facility (A. 70-72, 83-84). As another court observed in upholding a similar search procedure in *Bell* v. *Manson*, 427 F. Supp. 450, 452 (D. Conn. 1976) (inmates returning from court appearances):

> This type of search enables correctional officers to thwart attempts by returning inmates to smuggle in drugs, money, weapons and other items of contraband which may be small enough to be concealed in a body cavity. Moreover, the detainee's knowledge that such a search will be conducted has a beneficial deterrent effect.

Precisely because of the usefulness of the visual inspection as a means of detecting and deterring

[54] The district court conceded that inmates could secrete objects in rectal and genital areas during the loosely monitored contact visiting procedure at the MCC (Pet. App. 151a). During the trial, the judge asked the government's expert witness whether "a fully-dressed inmate could feasibly or with any frequency secrete contraband in the recum [sic] or something like that?" The witness answered "Absolutely. I know of cases where it has happened" (A. 71).

security violations, the procedure has been upheld by several courts as a constitutionally reasonable search following contact visits.[55] *E.g.*, *Hodges* v. *Klein*, 412 F. Supp. 896 (D. N.J. 1976); *Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836 (S.D. N.Y. 1975); cf. *Daughtery* v. *Harris*, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872 (1973); *Bell* v. *Manson*, *supra*. The conclusion of the court of appeals in this case that the search procedure is of "little actual utility" simply disregards this substantial evidence and improperly substitutes the court's judgment for that of corrections officials as to the security need served by the visual search procedure. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128; *Bell* v. *Procunier*, 417 U.S. at 827; *Bijeol* v. *Benson*, 404 F. Supp. 595 (S.D. Ind. 1975); *Penn El* v. *Riddle*, 399 F. Supp. 1059 (E.D. Va. 1975).

b. In determining the reasonableness of particular search procedures, it is ordinarily unnecessary to inquire into the availability of less intrusive alternatives for conducting the search. As was noted in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-557 n.12 (1976), "[t]he logic of * * * elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-

[55] The district court noted that if an object is inserted beyond the anal sphincter, it would not be detected by the visual inspection procedure. The court agreed, however, that the search procedure "may serve as a deterrent to people planning to secrete and import forbidden things" (Pet. App. 150a-151a).

and-seizure powers." Moreover, the Fourth Amendment requires only that the search not be "unreasonable"; it does not require the government to employ only the "most reasonable" search procedures. See *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970).

Nonetheless, as the district court stated in this case (Pet. App. 151a), the determination whether a particular search procedure is constitutionally reasonable requires "attention to the total setting" of the search. If the legitimate needs of institutional security can be accomplished by significantly less intrusive measures, it may be unreasonable to impose the greater restriction where the lesser would suffice. Cf. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 883 (1975). Such an analysis may be especially appropriate in the narrow context involved here, where the nature of the challenged search procedure implicates notions of personal dignity and decency.[56] But in determining the sufficiency of alternative measures to satisfy the legitimate needs of institutional security, the evaluation of correctional officials must be accorded substantial deference. *E.g.*, *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128; *Penn El* v. *Riddle*, *supra*, 399 F. Supp. at 1062. As is discussed below, the evidence and findings in this case do

[56] The inmate is not touched by security personnel at any time during the visual search procedure. A psychiatrist testified at trial that the visual inspection would not result in any emotional injury to the inmates (A. 82). The district court concluded that the visual search is uniquely personally affrontive even if not emotionally damaging (Pet. App. 150a-153a).

not identify any sufficient alternative to the visual inspection procedure.

The district court suggested that metal items could be detected by less intrusive forms of inspection, such as metal detecting equipment employed by airline security personnel (Pet. App. 151a). The court recognized, however, that drugs and other types of contraband would escape such inspection and that "some contraband will continue to make its way into jails and prisons" (*id.* at 152a). It is obvious that contraband does not have to be metallic to be dangerous or otherwise to pose a risk to institutional security. Indeed, drugs and money alone can create substantial risks to security and order and the safety of inmates. The less intrusive alternative posited by the district court thus falls significantly short of meeting the legitimate objectives of the visual search procedure following contact visits.

Another alternative, not discussed by the court below, would be to monitor individual contact visits constantly and closely in an effort to assure that inmates have no opportunity to secrete contraband items. Such constant and close monitoring, however, would severely tax available institutional resources.[57]

[57] It is apparent that individualized monitoring of contact visits would substantially increase the space, and number of correctional personnel, devoted to this particular aspect of the institutional program. Indeed, it is questionable whether the visiting facilities available at the MCC could be adapted to individualized visiting procedures. These matters were, in any event, not explored by the courts below.

Moreover, it would disrupt the privacy, confidentiality and personal intimacy that contact visitation is intended to afford.[58] These interests are independently significant and entitled to substantial weight in evaluating the reasonableness of the visitation procedure selected by correctional officials at the MCC. The courts below, however, did not evaluate the feasibility or desirability of such an alternative. On this record it cannot be said that the choice of correctional officials to provide for intimate and largely unsupervised contact visits, and to require a complete search following such visits, was not the preferable and reasonable choice. Cf. *Chambers* v. *Maroney*, *supra*, 399 U.S. at 53-54.

In sum, given the difficult task of accommodating inmate interests and correctional security requirements, the search procedure selected at the MCC to guard against the introduction of contraband into the facility following contact visits falls within the range of appropriate discretion afforded correctional officials. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 126.

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[58] The Draft Correctional Standards (see note 43, *supra*) propose that in circumstances where close and continuous monitoring of inmate contact visits occurs, strip searches with visual body cavity inspections not be required. Even if this proposal is eventually adopted, it would have no application at the MCC. The MCC allows many visitors and inmates to meet in the visiting rooms at one time, and the supervision of such visits is intentionally relaxed to allow for intimate and confidential contact.

D. The Practice Of Excluding Pretrial Detainees From Their Residential Rooms During Routine Room Inspections Is Justified By The Need To Avoid Disruption Of An Important Security Procedure

In a portion of its decision applying to pretrial detainees only, the court of appeals held that detainees must be allowed to observe routine inspections of their quarters. Substantial testimony was introduced before the district court to demonstrate that permitting detainees to observe room inspections would lead to unnecessary friction between detainees and security personnel and would allow detainees to attempt to frustrate the objectives of the search by distracting personnel and moving concealed contraband from one room to another ahead of the search party.[59] The district court held, however (Pet. App. 156a), that

> [a]t least until or unless [the correctional officials] can show a pattern of violence or other disruptions taxing the powers of control * * * the security argument for banishing inmates while their rooms are searched must be rejected.

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[59] One of the correctional experts testified (A. 78):

> * * * the requirement that prisoners not be in the immediate area obviously has its basis again in the requirements of security.
>
> It is quite obvious that if a group of officers start a searching process of a housing area at the MCC, if it be a corridor or an area of rooms or in a typical jail if it were a cell block, unless all prisoners are removed from that immediate area, there are a wide variety of opportunities for the confiscation of contraband by prisoners who may have such in their possession and cells.
>
> It can go down the toilet or out the window, swallowed, a wide variety of methods of confiscation of contraband.

The court concluded that the institutional justifications for the rule were insufficient to override the detainees' retained right of privacy (*ibid.*).[60] The court of appeals affirmed, stating that "[w]e see no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege * * *" (*id.* at 31a).

There are two significant errors in the lower courts' analysis of this issue. First, the courts failed to identify any relevant interest in liberty that is affected by the exclusion of detainees from their rooms during routine inspections. The district court stated that excluding detainees from room inspections infringes their interest in privacy. The court's conclusion, however, does not withstand analysis. To suggest that detainees have a reasonable expectation of privacy with regard to physical objects kept within their cell ignores the realities of institutional confinement. See, *e.g.*, *Lanza* v. *New York*, *supra*; *United States* v. *Hitchcock*, 467 F.2d 1107 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973). While routine inspection of quarters may reveal either contraband or lawful items that an inmate would prefer not to be discovered, it would seem beyond dispute that such

[60] The district court accepted the government's claim that the practice of excluding inmates from their rooms during routine inspections made the search more administratively feasible and thus held that, with regard to convicted inmates, the practice is permissible (Pet. App. 157a). Since respondents did not cross-appeal, the application of the room search rule to convicted inmates is no longer at issue.

inspections represent an appropriate security precaution that is permissible as a reasonable search under the Fourth Amendment. See *United States* v. *Hearst*, *supra*, 563 F.2d at 1337. Indeed, neither court below suggested that the practice of performing routine inspections was, by itself, improper. The requirement that detainees remain outside their rooms while such lawful inspections are performed results in no additional interference with the detainees' subjective privacy interest. The search of all physical objects will occur whether the detainees are allowed to watch or not. The requirement that detainees remain outside their rooms during the inspection merely facilitates the safe and efficient performance of the search, it does not independently infringe the detainees' privacy. While it may be only "a small privilege" to allow detainees to observe room inspections (Pet. App. 31a), there is no constitutional content to the privilege sought.

Second, the district court erred in placing the burden on the administrators to prove "a pattern of violence or other disruptions" (*id.* at 156a) to justify the exclusion of detainees from room inspections. Considering the absence of any identifiable liberty interest implicated by the challenged rule, the government's interest in administrative convenience is alone sufficient to justify the exclusion of inmates from routine room inspection. Moreover, where the possibility of a security risk exists, correctional officials "must be permitted to act before * * * the eve of a riot." *Jones* v. *North Carolina Prisoners' Labor*

Union, supra, 433 U.S. at 132-133. The burden is not on the government to establish that the precaution of excluding detainees during room inspections is necessary to avert a " 'present danger to security and order.' " *Id.* at 128. The testimony of correctional experts established that, in their judgment, if detainees were allowed to observe room inspections, the security of the institution, and of the guards themselves, would be placed at risk (A. 26, 66, 73). In view of the appropriate deference accorded correctional officials in the determination of security requirements, the absence of substantial evidence in the record to show that these concerns are exaggerated, and the limited nature of the inmate interest involved, this rule should have been sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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